

ESTTA Tracking number: **ESTTA132985**

Filing date: **03/30/2007**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91165449
Party	Plaintiff BOSE CORPORATION BOSE CORPORATION THE MOUNTAIN FRAMINGHAM, MA 017019168
Correspondence Address	CHARLES HIEKEN FISH & RICHARDSON PC 225 FRANKLIN ST BOSTON, MA 02110-2804 UNITED STATES brosius@fr.com, escott@fr.com
Submission	Brief on Merits for Plaintiff
Filer's Name	Amy L. Brosius
Filer's e-mail	brosius@fr.com, tmdocbos@fr.com
Signature	/Amy L. Brosius/
Date	03/30/2007
Attachments	bose goldwave brief.pdf (23 pages)(59168 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No. 78/413,775
For the Mark GOLDWAVE
Published in the Official Gazette on April 12, 2005

Bose Corporation,

Opposer,

v.

GoldWave Incorporated,

Applicant.

Opposition No. 91165449

BRIEF OF OPPOSER

Charles Hieken
Cynthia Johnson Walden
Amy L. Brosius
FISH & RICHARDSON P.C.
225 Franklin Street
Boston, MA 02110
Tele. (617) 542-5070
Fax: (617) 421-698

Attorneys for Opposer,
BOSE CORPORATION

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STATEMENT OF THE FACTS

On June 6, 2005 Opposer Bose Corporation (“Bose”) filed a Notice of Opposition against Application Serial No. 78/415,775, filed May 5, 2004, by Applicant, Goldwave Incorporated (“Goldwave”) seeking registration of GOLDWAVE for “computer software for audio editing.” The Board instituted this proceeding on June 6, 2005. Bose alleged prior use of the marks WAVE and ACOUSTIC WAVE on one or more of radios, clock radios, audio tape recorders and players, portable radio and cassette recorder combinations, compact stereo systems and portable compact disc players; loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and audio tape cassette player.

Bose is the owner of the following incontestable registrations: Registration No. 1,633,789, issued on February 5, 1991, of WAVE for radios, clock radios, audio tape recorders and players, portable radio and cassette recorder combinations, compact stereo systems and portable compact disc players; Registration No. 1,338,571, issued on May 28, 1985, of ACOUSTIC WAVE for loudspeaker systems; and Registration No. 1,764,183, issued April 13, 1993, of ACOUSTIC WAVE for loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and audio tape cassette. Bose Notice of Opposition, p. 2, Ex 1¹.

On August 18, 2006, Bose took testimony through Santiago Carvajal with Exhibits BX1-24 deemed to have been offered into evidence with the provisions of 37 C.F.R. § 2.123(c)(2).

¹ The Bose Notice of Opposition, filed June 6, 2005, included as an exhibit certified copies of Bose’s pleaded registrations, certified as of February 14, 2005.

SC1-68; BX1-24.² Goldwave participated in this deposition by telephone and conducted a cross examination of the witness.

Mr. Carvajal is a Category Business Manager at Bose Corporation, responsible for the WAVE line products. SC7-8. Mr. Carvajal received a degree in Electrical Engineering from Worcester Polytechnic Institute and a Master's of Business Administration from Babson College. SC6. Prior to the Category Business Manager for WAVE products, Mr. Carvajal was Senior Product Manager for the WAVE products. SC7. Prior to that, Mr. Carvajal was a Product Manager and Associate Product Manager for the WAVE products. SC6-7. Mr. Carvajal testified that as Product Manager, his responsibilities included launching new products, test marketing, pricing, and advertising. SC6-7.

Mr. Carvajal testified that he is familiar with the Bose WAVE family of products, which include three major product categories: the ACOUSTIC WAVE music system, the WAVE music system, and the WAVE radio. SC8. Mr. Carvajal identified the ACOUSTIC WAVE music system as the first WAVE product introduced by Bose. SC8. Mr. Carvajal identified the ACOUSTIC WAVE music system as a self-contained "one-box" music system that includes a CD player, AM/FM tuner, and connections for external components. SC8-9. Mr. Carvajal explained that the ACOUSTIC WAVE music system is adaptable to other Bose systems such as the Bose LIFESTYLE systems, through the BOSE LINK port which is a device that provides for communication and audio output between the ACOUSTIC WAVE music system and the LIFESTYLE system. SC9. Mr. Carvajal testified that the ACOUSTIC WAVE music system can be connected to a television, or to MP3 players, or to a computer that stores MP3 audio files, so that consumers can play audio through these devices into the ACOUSTIC WAVE music

² We refer to Santiago Carvajal testimony on behalf of Bose as SC. We refer to Bose exhibits by BX.

system and obtain better sound output. SC23. Mr. Carvajal also testified that the ACOUSTIC WAVE music system can be used as a personal amplification system, by plugging in a microphone to the ACOUSTIC WAVE system. SC25.

Mr. Carvajal testified that the ACOUSTIC WAVE music system was first introduced in 1984 (SC9-10) and he identified press releases for the ACOUSTIC WAVE music system series I and III. SC14-15; BX2-3. Mr. Carvajal testified that in excess of 560,000 ACOUSTIC WAVE music system units have been sold since 1984, generating in excess of \$610 million in revenue. SC11-12.

Mr. Carvajal testified that the ACOUSTIC WAVE music system is targeted to a very broad consumer base, essentially, “anyone who loves music.” SC12-13. The ACOUSTIC WAVE music system is sold to primarily through direct consumer channels such as through Bose’s website and Bose’s toll-free telephone number, but that the ACOUSTIC WAVE music system can also be purchased in Bose factory direct retail stores, through catalog distributors such as Crutchfield, and through premium incentive programs, where companies purchase Bose products and then use them as employee incentives. SC13-14.

Mr. Carvajal testified that the Bose ACOUSTIC WAVE music system is advertised in many different venues, primarily print advertising, such as catalogs and newspapers, but also via direct mail, broadcast advertising, radio advertising, via the Bose website and third party affiliate websites, Bose brochures, and at trade shows. SC16-19.

Mr. Carvajal identified a number of ACOUSTIC WAVE music system product brochures. SC19-20; BX6. He testified that the product brochures are typically distributed to customers who call Bose and request additional information about the ACOUSTIC WAVE music system. SC19. ACOUSTIC WAVE music system brochures have also been distributed

along with other Bose products and distributed at major trade shows, such as the Consumer Electronics trade show in Las Vegas and IFA, the European electronics trade show in Germany. SC19-20.

Mr. Carvajal testified that the ACOUSTIC WAVE music system is advertised in such large scale national publications as USA Today and Parade Magazine. SC17, BX10. Mr. Carvajal testified that Bose also advertises the ACOUSTIC WAVE music system in such publications as the New York Times Magazine, Boston Globe, and Sound & Vision. SC17-18, 20-23; BX7. Mr. Carvajal identified examples of advertisements for the ACOUSTIC WAVE music system appearing in SkyMall, the Delta Airlines catalog, the USAir catalog, Frontgate, and Alsto's Handy Helpers. SC25-26; BX9. Mr. Carvajal also testified that Bose advertises the ACOUSTIC WAVE music system on the Bose website and on affiliate websites like Amazon.com and identified examples from the Bose website that advertise the product. SC17-18, 24-25; BX8.

Mr. Carvajal testified that the ACOUSTIC WAVE music system has been profiled in numerous press articles including in such publications as the Chicago Tribune, the Boston Herald, High Fidelity, the Atlantic, Popular Science, Stereo Guide, and the Philadelphia Enquirer, and identified a series of press articles dating back to 1984. SC15-16; BX4. Mr. Carvajal also identified a brochure that describes Dr. Bose and Dr. Short receiving the Inventor of the Year Award from Intellectual Property Owners, Inc. for the waveguide loudspeaker technology embodied in the Bose ACOUSTIC WAVE music systems and the WAVE radio in 1987. SC18; BX5.

Mr. Carvajal testified that the ACOUSTIC WAVE music system is often referred to by customers as the "WAVE" machine, the "WAVE", as well as "ACOUSTIC WAVE." SC10.

Mr. Carvajal testified that he is familiar with the Bose WAVE radio and WAVE radio/CD. SC29. Mr. Carvajal testified that the Bose WAVE radio, which was introduced in 1993, is a smaller version of the ACOUSTIC WAVE music system, with a radio tuner and an alarm clock inside it. SC29-30. Mr. Carvajal testified that the WAVE radio/CD, which was introduced in 1999, is in essence the same product as the WAVE radio but with a CD player attached. SC30.

Mr. Carvajal testified that in excess of three (3) million units of the WAVE radio and WAVE radio/CD products (hereinafter, collectively, the “WAVE products”) have been sold since inception, generating in excess of \$1.5 billion in revenue. SC31-32. Mr. Carvajal testified that the WAVE products are marketed to a similarly broad audience as the ACOUSTIC WAVE music system, but at a lower price. SC32. He testified that the WAVE products are sold in exactly the same channels of trade as the ACOUSTIC WAVE music system, namely, the Bose website, the Bose 800 number, the Bose retail stores, catalogs, and through premium incentive programs. SC32-33; BX16.

Mr. Carvajal identified press releases for the WAVE radio. SC33; BX11-12. He also identified numerous examples of press coverage of the WAVE products, dating from 1993, in such publications as Radio Waves, Home Electronics, San Francisco Chronicle, Chicago Tribune, Audio/Video International, Where Boston, the Detroit News, and Popular Science. SC34-35; BX13, 15.

Mr. Carvajal identified a transcript of the National Public Radio show “Car Talk” from 2000 where the WAVE radio was mentioned on the show. SC35-36; BX13. Mr. Carvajal identified a transcript from another radio show in New York which profiled the WAVE radio. SC36; BX13. Mr. Carvajal also identified copies of letters and excerpts from letters from

consumers of the WAVE products indicating their satisfaction with the WAVE products. SC36-37; BX14.

Mr. Carvajal testified that the WAVE radio has been advertised on buses, in subway stations, and on television. SC39. He identified a number of advertisements and direct mail pieces for the WAVE radio and/or WAVE radio/CD products in such publications as Home and Garden, the New York Times Magazine, Frontgate, Parade Magazine, and the Mercedes-Benz catalog. SC38-39; BX15, 17-18.

Mr. Carvajal testified that a conservative statement of Bose expenses in connection with the advertising of the ACOUSTIC WAVE and WAVE products is in excess of \$360 million. SC41.

Mr. Carvajal also testified that he is familiar with the Bose WAVE music system, and he was the product manager for this new product when it was launched in 2004. SC42, 44. Mr. Carvajal testified that the Bose WAVE music system replaces the Bose WAVE radio/CD, and incorporates new features. SC43-44. The primary difference is that the functionality of the WAVE music system is entirely digital. SC44. As such, it has MP3 playback capabilities so that customers can burn MP3 CDs and play them back through the WAVE music system. SC43. The WAVE music system also contains a BOSE LINK port so that the WAVE music system can operate with the Bose LIFESTYLE music system, which is an audio system with digital music storage capacity. Id.

Mr. Carvajal identified advertisements from the www.bose.com website for the WAVE music system. SC47; BX20, 21. Mr. Carvajal identified examples of press coverage for the WAVE music system in such publications as the Indianapolis Star and Metrowest Daily News. SC46-47; BX19. Mr. Carvajal also identified a number of advertisements for the WAVE music

system dating from 2004 when the product was introduced to the present, in such publications as Parade Magazine, USA Weekend, and Guideposts. SC47-48; BX21.

Goldwave took the testimonial deposition of Mr. Christopher Craig, President of Goldwave, on November 17, 2006.³

During his deposition, Mr. Craig testified that he selected the GOLDWAVE mark in part out of a desire to symbolize quality, where he believes “gold” often represents quality. CC5. Mr. Craig testified that the GOLDWAVE product was first sold in 1993. CC5-6. Mr. Craig testified that the GOLDWAVE product is an audio editing software that can manipulate, convert, restore, record, and analyze audio files. CC6-7. Mr. Craig also testified that the GOLDWAVE product is sold almost exclusively through the Internet. CC9.

Goldwave did not file a Notice of Reliance in this case.

³ We refer to Christopher Craig testimony on behalf of Goldwave as CC. We refer to Goldwave exhibits by CX.

ARGUMENT

- I. “GOLDWAVE” WITHOUT CHANNEL RESTRICTIONS FOR AUDIO EDITING SOFTWARE IS SUFFICIENTLY SIMILAR IN APPEARANCE, CONNOTATION, AND SOUND TO THE FAMOUS “WAVE” AND “ACOUSTIC WAVE” MARKS PREVIOUSLY USED AND REGISTERED BY BOSE WITHOUT CHANNEL RESTRICTIONS FOR RADIOS, CLOCK RADIOS, AUDIO TAPE RECORDERS AND PLAYERS, PORTABLE RADIO AND CASSETTE RECORDER COMBINATIONS, COMPACT STEREO SYSTEMS AND PORTABLE COMPACT DISC PLAYERS; LOUDSPEAKER SYSTEMS; MUSIC SYSTEMS CONSISTING OF A LOUDSPEAKER SYSTEM AND AMPLIFIER AND AT LEAST ONE OF A RADIO TUNER, COMPACT DISC PLAYER AND AUDIO TAPE CASSETTE PLAYER, THAT CONFUSION, DECEPTION, OR MISTAKE IS LIKELY

Likelihood of confusion is evaluated by examining various factors set forth in *In re E.I. DuPont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973). Examination of each of the DuPont factors is not necessary to a determination of likelihood of confusion; different factors may play a dominant role in determining likelihood of confusion depending on the evidence of each case. *Bose Corporation v. QSC Audio Products, Inc.*, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (citing *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992)). In this case, the factors that are most significant are the similarity of the marks, the fame of the Bose WAVE and ACOUSTIC WAVE marks, the relatedness of the products, and absence of restrictions on channels of trade and potential purchasers.

- A. THE BOSE “WAVE” AND “ACOUSTIC WAVE” MARKS ARE FAMOUS AND THEREFORE ENTITLED TO A WIDE SCOPE OF PROTECTION

The fame of the Bose WAVE and ACOUSTIC WAVE marks weigh heavily towards a finding of likelihood of confusion. It is well settled that [f]ame of an opposer’s mark, if it exists, plays a “dominant role in the process of balancing the DuPont factors,” *Recot, Inc. v. M.C. Becton*, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000) (citations omitted), and “famous marks thus

enjoy a wide latitude of legal protection.” *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, “[a] strong mark...casts a long shadow which competitors must avoid.” *Kenner Parker Toys*, 22 USPQ at 1456. A famous mark is one “with extensive public recognition and renown.” *Bose v. QSC* 63 USPQ2d at 1305 (citations omitted).

There is overwhelming evidence of the fame of the ACOUSTIC WAVE and WAVE marks. First of all, the Federal Circuit has determined Bose’s WAVE and ACOUSTIC WAVE marks to be famous. *Id.* at 1309. The Federal Circuit considered evidence of considerable sales, advertising presence, and promotional expenditures of the Bose WAVE and ACOUSTIC WAVE products, and concluded: “When the full record is considered, only one conclusion can be reached regarding the fame of the Bose product marks; they are famous and thus entitled to broad protection.” *Id.*

Second, the same substantial and compelling evidence of the fame of the WAVE and ACOUSTIC WAVE marks which the Federal Circuit considered in determining the fame of the WAVE and ACOUSTIC WAVE marks in the *Bose v. QSC* case has been put in the record in this case. *Id.*

Bose’s witness, Mr. Santiago Carvajal, testified that the ACOUSTIC WAVE mark has been used by Bose for over 23 years and in excess of 560,000 ACOUSTIC WAVE units have been sold generating in excess of \$610 million in revenue. SC11-12. The ACOUSTIC WAVE products have been advertised in many national publications, such as USA Today, Parade Magazine, New York Times Magazine, Boston Globe, Sound & Vision, SkyMall, and Frontgate (SC17-18, 25-26; BX7, 9, 10) as well as through direct mail and on Bose’s website. SC16-19; BX8.

In addition, there has been significant press coverage of the ACOUSTIC WAVE product, including in the Chicago Tribune, the Boston Herald, High Fidelity, the Atlantic, Popular Science, Stereo Guide, and the Philadelphia Enquirer. SC15-16; BX4. The Intellectual Property Owners, Inc. awarded Dr. Bose and Dr. Short the Inventor of the Year Award for the waveguide technology embodied in the ACOUSTIC WAVE music system and the WAVE radio. SC18; BX5.

Mr. Carvajal further testified that the WAVE mark has been used by Bose for 14 years and in excess of 3 million WAVE units have been sold generating in excess of \$1.5 billion in revenue. SC31-32. The WAVE mark has been advertised by direct mail, through catalogs, via the Internet, in such publications as Home and Garden, the New York Times Magazine, Frontgate, and Parade Magazine (SC38-39; BX15, 17-18), on regional and national radio programs (SC35-36; BX13), and on public transportation vehicles such as buses and subways. SC39. There has been significant press coverage of the WAVE products, including in Home Electronics, San Francisco Chronicle, Chicago Tribune, Audio/Video International, Where Boston, the Detroit News, and Popular Science. SC34-35; BX13, 15. The Bose WAVE music system, introduced in 2004, has also been the subject of numerous mentions in the press, and the subject of advertising in such national publications as Parade Magazine and USA Weekend. SC46-48; BX19, 21.

Bose has spent in excess of \$360 million in connection with the advertising of the Bose ACOUSTIC WAVE and WAVE products. SC41. Such compelling evidence leads inexorably to the same conclusion made by the Federal Circuit in *Bose v. QSC*, namely, that the ACOUSTIC WAVE and WAVE marks are famous, and as such are entitled to a wide scope of protection. *See Bose v. QSC*, 64 USPQ2d at 1305; *see also Kenner Parker*, 22 USPQ2d at 1456

(“Thus, a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark.”).

B. “GOLDWAVE” IS CONFUSINGLY SIMILAR TO THE FAMOUS BOSE “WAVE” AND “ACOUSTIC WAVE” MARKS

Since Bose has priority in its use of its registered trademarks WAVE and ACOUSTIC WAVE, the determinative issue in this case is whether the GOLDWAVE mark and the WAVE and ACOUSTIC WAVE marks are sufficiently similar in appearance, sound, or connotation that confusion, deception, or mistake is likely. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 182 USPQ 108 (CCPA 1974); *Flow Technology, Inc. v. Picciano*, 18 USPQ2d 1970 (TTAB 1991).

The marks are clearly similar. Here, the GOLDWAVE mark incorporates – as the most prominent element – the entirety of the incontestably registered famous Bose WAVE mark, as well as the salient portion of the incontestably registered, famous Bose ACOUSTIC WAVE mark. Goldwave’s President, Mr. Craig, testified that the “gold” component in GOLDWAVE was selected to signal quality. CC5-6. “Gold” is thus laudatory and descriptive when used in this context, as Goldwave has admitted. The use of “gold” in this manner only reinforces the likely consumer perception that the GOLDWAVE product is an enhanced or special WAVE product, or is in some way affiliated with the WAVE and ACOUSTIC WAVE audio products.

It is well-established that “[a] subsequent user may not appropriate another’s entire mark and avoid likelihood of confusion therewith by merely adding descriptive or otherwise subordinate matter to it.” *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). The dominant and distinctive component of Goldwave’s GOLDWAVE mark is the “WAVE” syllable. The “GOLD” syllable is a visually and connotatively subordinate portion of Goldwave’s mark because “GOLD” is used in a merely laudatory and descriptive sense.

At the very least, the fact that the GOLDWAVE mark embodies the entire famous Bose WAVE mark means that consumers are likely to be mistaken or deceived into believing the GOLDWAVE products are affiliated in some way with Bose. *See Earth Technology Corp. v. Environmental Research and Technology, Inc.*, 222 USPQ 585 (C.D. Cal. 1983) (ERTEC confusingly similar to ERT); *see also Glamorene Prod. Corp. v. Proctor & Gamble Co.*, 190 USPQ 543 (CCPA 1976) (BOUNCE BACK confusingly similar to BOUNCE).

In fact,

[t]he Board itself, other courts and this court have been confronted frequently with situations similar to this one, in which a competing mark shares a core portion of a senior marks, and in which the competing mark was found too similar to the other mark to earn mark status for itself. *See McCarthy, supra*, § 23.29. Typical of the marks found similar in sound and connotation are AQUA-CARE and WATER-CARE, BEER NUTS and BREW NUTS, BLUE SHIELD and RED SHIELD, GENTLE TOUCH and KIND TOUCH, MANPOWER and WOMANPOWER, DOWNTOWNER and UPTOWNER, WEED EATER and LEAF EATER, THERMO KING and ZERO KING.

Bose v. QSC, 63 USPQ2d at 1311; J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23.29 (4th ed. 2007). In this same case, the Federal Circuit held that applicant's POWERWAVE mark and Bose's WAVE and ACOUSTIC WAVE marks were confusingly similar. *Bose v. QSC*, 63 USPQ2d at 1312.

In addition,

[i]t is not necessary for similarity to go only to the eye or ear for there to be infringement. The use of a designation which causes confusion because it conveys the same idea, or stimulates the same mental reaction, or has the same meaning is enjoined on the same basis as where the similarity goes to the eye or ear.

Standard Oil Co. v. Standard Oil Co., 116 USPQ 176, 182 (10th Cir. 1958) (footnotes omitted).

In this case, GOLDWAVE, ACOUSTIC WAVE and WAVE all stimulate the same mental

reaction and have the same commercial impression – that of products from the same source. *A fortiori*, where there is identity of appearance, sound, and connotation of the primary WAVE portions of the GOLDWAVE mark and the Bose incontestably registered, famous trademarks WAVE and ACOUSTIC WAVE, there is likelihood of confusion.

C. THE PRODUCTS IDENTIFIED IN THE “GOLDWAVE” APPLICATION ARE CLOSELY RELATED TO THE BOSE “WAVE” AND “ACOUSTIC WAVE” PRODUCTS SUCH THAT CONSUMERS ARE LIKELY TO BE CONFUSED, DECEIVED, OR MISTAKEN IN BELIEVING THAT THE “GOLDWAVE” PRODUCTS ARE AFFILIATED WITH BOSE

Consumer confusion is likely because the goods identified in the GOLDWAVE application are highly similar to the goods identified in the incontestable WAVE and ACOUSTIC WAVE registrations.

The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application, regardless of what the record may reveal as to the particular nature of applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of the goods are directed.

Octocom Systems, Inc. v. Houston Computer Services, Inc., 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Squirtco v. Tomy Corp.*, 216 USPQ 937, 940 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 209 USPQ 986, 988 (CCPA 1981).

In addition, the Federal Circuit has held that the fame of the mark also has a significant bearing on the evaluation of the relatedness of the goods when assessing likelihood of confusion. In *Recot*, the Federal Circuit held that confusion was likely between FIDO LAY for edible dog snacks and FRITO LAY for human snack food, in view of the fame of the FRITO LAY mark. 54 USPQ2d at 1897. Thus, “[i]t is precisely these circumstances which demand great vigilance on the part of a competitor who is approaching a famous mark, for as the present case illustrates,

the lure of undercutting or discounting the fame of a mark is especially seductive.” *Bose v. QSC*, 64 USPQ2d at 1306 (*quoting Recot*, 54 USPQ2d at 1897). Accordingly, it is well settled that competitors should exercise great diligence when approaching famous marks such as the Bose WAVE and ACOUSTIC WAVE marks. *See Kenner Parker Toys*, 22 USPQ at 1456 (“[a] strong mark...casts a long shadow which competitors must avoid.”).

The goods identified in the Bose WAVE and ACOUSTIC WAVE registrations are types of audio products: Registration No. 1,633,789 of WAVE for radios, clock radios, audio tape recorders and players, portable radio and cassette recorder combinations, compact stereo systems and portable compact disc players; Registration No. 1,338,571 of ACOUSTIC WAVE for loudspeaker systems; and Registration No. 1,764,183 of ACOUSTIC WAVE for loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and audio tape cassette player. Bose Notice of Opposition, p. 2, Ex. 1.

Bose’s witness, Mr. Carvajal, testified that the ACOUSTIC WAVE music system is self-contained music system with a CD player, radio tuner, and connections for external components, and which can be hooked up to a television or music storage device such as a computer or a MP3 player so that consumers can play audio from these devices through the ACOUSTIC WAVE music system and obtain better sound output. SC8-9, 23.

Mr. Carvajal also testified that the Bose WAVE radio and radio/CD audio products are generally smaller versions of the ACOUSTIC WAVE music system, with the WAVE radio including a radio tuner and alarm clock, and the WAVE radio/CD having an additional CD Rom player component. SC29-30. Mr. Carvajal gave further testimony that the WAVE music system

is a new entirely digital audio music system, which has MP3 audio file playback capabilities so that customers can burn MP3 discs and play them back through the WAVE music system. SC43.

The goods identified in the GOLDWAVE Application Serial No. 78/413,775 are “audio editing software.” Audio editing software is highly related to the Bose WAVE and ACOUSTIC WAVE audio products. Audio editing software can be used to manipulate audio music files. CC6-7. Audio music files, when burned to a disc or saved on a computer, can be played back through the Bose ACOUSTIC WAVE music system (SC23), the WAVE radio/CD (SC30), or the WAVE music system. SC43.

The complementary nature of the parties’ goods only serves to reinforce the conclusion that the parties’ goods are highly similar and that confusion, deception, or mistake is likely. *See e.g., Bose v. QSC*, 64 USPQ2d at 1310 (evidence of Bose products in component market provides further support relatedness of the products since “the consumer has to be aware that Bose offers many acoustic products.”). Furthermore, even use of a mark on related but noncompetitive goods may be sufficient to establish likelihood of confusion. “The marks need not be used on directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient.” *Dan Robbins & Assoc., Inc. v. Questor Corp.*, 599 F.2d 1009, 1013, 202 USPQ 100, 104 (CCPA 1979) (TINKERTOY for games, toys, children’s books and LI’L TINKER for children’s books); *see also Sterling Drug Inc. v. Sebring*, 515 F.2d 1128, 185 USPQ 649 (CCPA 1975) (Ankh Design for hair conditioner and shampoo and Ankh Design for various medicated products); *In re Amtel, Inc.*, 189 USPQ 58 (TTAB 1975) (FREEWAY for auto tires and FREEWAY for gasoline); *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984) (LAREDO for vehicles and LAREDO for tires); *Saab-Scania Aktibolag v. Sparkomatic Corp.*,

26 USPQ2d 1709 (TTAB 1993) (9000 for a model of automobile and 9000 SERIES for automobile stereo speakers).

While Bose submits that the relatedness of the goods is without doubt, to the extent there is any doubt in this matter, this doubt should be resolved in favor of senior user Bose against Goldwave. “It is proper to construe applicant’s description of its goods in the manner most favorable to opposer.” *CBS, Inc. v. Morrow*, 218 USPQ 198, 199, n.3 (Fed. Cir. 1983); *CTS Corp. v. Cronstoms Mfg., Inc.*, 185 USPQ 773, 774 (CCPA 1975).

D. THE CHANNELS OF TRADE AND CLASSES OF PURCHASERS FOR THE “GOLDWAVE” PRODUCTS AND THE “WAVE” AND “ACOUSTIC WAVE” PRODUCTS ARE UNRESTRICTED

The channels of trade and classes of purchasers for the GOLDWAVE and Bose WAVE and ACOUSTIC WAVE products are the same.

Registrability must be determined on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales are directed.

Bose v. QSC, 64 USPQ2d at 1310-11. “In the absence of any express limitations in the involved application(s) or registration(s), the Board assumes that the channels of trade for the goods or services are those normal for such goods or services, and that the purchasers are the same.” *Id.*

There are no limitations on the channels of trade in the GOLDWAVE application or in the WAVE and ACOUSTIC WAVE registrations, therefore, likelihood of confusion is evaluated relative to all channels of trade and all classes of purchasers for the identified goods. *See In re Melville Corp.*, 18 USPQ2d 1387, 1388 (TTAB 1991); *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 23 USPQ2d 1945 (Fed. Cir. 1992); *Canadian Imperial Bank v. Wells Fargo Bank*, 1 USPQ2d at 1815; *CBS, Inc. v. Morrow*, 218 USPQ 198 (Fed. Cir. 1983); *Glamorene*, 190 USPQ 543.

Where the goods are highly related, indeed complementary, and there are no limitations on the channels of trade or classes of purchasers in the Applicant's GOLDWAVE application or in the Bose WAVE or ACOUSTIC WAVE registrations, this likelihood of confusion factor favors Bose.

II. DOUBTS AS TO LIKELIHOOD OF CONFUSION ARE RESOLVED AGAINST THE NEWCOMER

While there is no doubt as to likelihood of confusion between GOLDWAVE and WAVE and ACOUSTIC WAVE, doubts as to likelihood of confusion are resolved against the newcomer. "It is well settled that one who adopts a mark similar to another for closely related goods acts at his peril and any doubt there might be must be resolved against him." *Carlisle Chem. Works, Inc. v. Hardmann & Holden, Inc.*, 168 USPQ 110, 112 (CCPA 1970); *J&J Snack Foods Corp. v. McDonald's Corp.*, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Kimberley-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 227 USPQ 541, 543 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 USPQ 1281, 1284 (Fed. Cir. 1984). The fame of the Bose WAVE and ACOUSTIC WAVE marks also necessitates that any doubt should be resolved in favor of Bose and against Goldwave. "There is no excuse for even approaching the well-known trademark of a competitor...and that all doubt as to whether confusion, mistake, or deception is likely to be resolved against the newcomer, especially where the established mark is one which is famous." *Kenner Parker*, 22 USPQ2d 1453, 1456 (citing *Nina Ricci, S.A.R.L. v. ETF Enterprises, Inc.*, 12 USPQ 1901, 1903 (Fed. Cir. 1989), quoting *Planters Nut & Chocolate Co. v. Crown Nut Co., Inc.*, 134 USPQ 504, 508 (CCPA 1962)). Here, if there be any doubt regarding the newcomer Goldwave, it must be resolved against junior user Goldwave when measured against the rights of senior user Bose, the owner of the famous and incontestably registered WAVE and ACOUSTIC WAVE marks.

CONCLUSION

For the reasons set forth above, the opposition should be sustained.

Respectfully submitted,

Date: March 30, 2007

/Amy L. Brosius/

Charles Hieken

Cynthia Johnson Walden

Amy L. Brosius

FISH & RICHARDSON P.C.

225 Franklin Street

Boston, MA 02110

Telephone: (617) 542-5070

Facsimile: (617) 542-8906

Attorneys for Opposer,
BOSE CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF OPPOSER has this 30th day of March 2007 been mailed by prepaid first class mail to the below-identified Attorney at his/her place of business:

Ms. Mylene Dao
Flansberry, Menard & Associates
504 Kent Street
Ottawa, Ontario
K2P 2B9
CANADA

/Amy L. Brosius/

Amy L. Brosius